

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company)	
)	
Petition for confidential treatment for portions)	
of the notice of transfer of generating assets)	
and wholesale marketing business and entry)	
into related agreements pursuant to)	
Section 16-111(g) of the Illinois Public)	
Utilities Act.)	
)	Docket Nos. 00-0369 and 00-0394
Illinois Commerce Commission)	(Consolidated)
vs.)	
Commonwealth Edison Company)	
)	
Notice of transfer of generating assets and)	
wholesale marketing business and entry into)	
related agreements pursuant to)	
Section 16-111(g) of the Illinois Public)	
Utilities Act.)	

**COMMONWEALTH EDISON COMPANY'S
RESPONSE TO MOTION TO STAY ORDER**

Commonwealth Edison Company ("ComEd" or the "Company") submits this Response in opposition to the Motion to Stay filed by the Illinois Industrial Energy Consumers ("IIEC"). In its Motion, IIEC asks the Commission, irrespective of whether the Commission grants rehearing, to stay indefinitely the effect of its August 17, 2000 Order authorizing the transfer of ComEd's nuclear stations, nuclear decommissioning trusts funds and wholesale marketing business to an affiliate, Exelon Genco. As will be discussed, the stay IIEC seeks would contradict the sound conclusions the Commission reached in its Order and would frustrate the purpose of Section 16-111(g) of the Illinois Public Utilities Act ("Act"), 220 ILCS 5/16-111(g) (1999).

Moreover, IIEC has not met the technical requirements for a stay. IIEC is asking the Commission to conclude that it is more likely than not that the Commission has misinterpreted various provisions of the Act -- based solely on the very same infirm arguments that the Commission has already (and properly) rejected.

If IIEC pursues an appeal of the Commission's Order, it can ask the Appellate Court for a stay. The Commission's Order is sound, and there is no reason for the Commission to stay its effectiveness.

I. A Stay Would Be Inconsistent With Section 16-111(g)

ComEd filed a notice of the Transfer to the Commission pursuant to Section 16-111(g) of the Act on May 22, 2000. The General Assembly included Section 16-111(g) in the Customer Choice Law to provide electric utilities within an expedited means of restructuring their operations both to promote and to respond to retail competition. Accordingly, Section 16-111(g) requires the Commission to enter a final order, approving or prohibiting a proposed transaction, no later than 90 days after the filing of the notice. The Commission has no authority to extend the proceeding beyond the 90 day deadline. To further promote expeditious resolution, the Section requires rehearing requests to be filed within 10 days after issuance of an order, instead of the generally applicable 30 day period.

IIEC asks the Commission to effectively disregard the 90 day time limit in Section 16-111(g), and defer resolution of the Company's Transfer indefinitely, even where the Commission has already determined that the Transfer satisfies the legal requirements under Section 16-111(g), and may proceed.

Staying the effectiveness of the Order would be inconsistent with, and frustrate the purpose of, Section 16-111(g). A stay would effectively eliminate the 90 day deadline

imposed by the General Assembly because it would prevent an electric utility that has satisfied the designated requirements from proceeding with a transaction in the time period envisioned by the General Assembly.

There is no reason for doing so. As the Commission has properly found, ComEd's Transfer will not adversely affect reliability or rates. To the extent that issues remain regarding decommissioning cost responsibility, those issues are being addressed in Docket No. 00-0361. Accordingly, IIEC's request for a stay should be denied.

II. IIEC Has Not Satisfied The Requirements For A Stay

Even if it were appropriate to enter a stay in a proceeding involving a transaction under Section 16-111(g), IIEC has not satisfied the requirements for such stay. Generally, a party requesting a stay must demonstrate: 1) a likelihood of prevailing on the merits; 2) that irreparable harm will result to that party if the stay is not granted; and 3) that the harm to other parties that would result from a stay is outweighed by other factors. *City of Chicago v. Commerce Comm'n*, 133 Ill. App.3d 435, 450 (1st Dist. 1985); *Commonwealth Edison Co.*, ICC docket Nos. 87-0427, et al (consol.), 1993 ILPUC LEXIS 21, [*2] (Jan. 8, 1993). Moreover, the Commission has made clear that all three factors of the test must be satisfied. In particular, the Commission will not grant a stay if the requesting party does not convince the Commission that the party has a likelihood of prevailing on the merits. *Commonwealth Edison Co.*, 1993 ILPUC LEXIS 21 at [*3 -*4]; *see also City of Chicago*, 133 Ill.App.3d at 450.

A. IIEC Has No Likelihood Of Prevailing On The Merits

In its Motion, IIEC argues that it will prevail on appeal because "there is no case law or precedent that supports the Commission's interpretation of Section 8-508.1" of the Act. According to IIEC, the Commission's decision "rests upon a faulty interpretation of two words in

a statute that are taken completely out of context." To the contrary, the Commission has correctly interpreted the Act, relying on its express terms, while it is IIEC that advances a baseless interpretation of single word in the Act -- "assets" -- that is contrary to both the use of that term in the Act and conventional understanding of that word.

Section 16-111(g) provides that, subject to the provisions of that subsection, an electric utility may "sell, assign, lease or otherwise transfer assets to an affiliated or unaffiliated entity and as part of such transaction enter into . . . agreements with the transferee." The subsection does not define "assets," nor is there any need to do so. As the Order properly found, there is no ambiguity as to whether the decommissioning trusts are ComEd assets, and the trust funds are properly reflected in "agreements with the transferee."

IIEC's principal argument in this case was that the term "assets" should be given the meaning the legislature intended, and that meaning should be applied consistently wherever the term is used in the Act. IIEC argued then that "assets" in Section 16-111(g) did not include decommissioning trust funds. As the Order correctly notes, however, the Act itself refers to the decommissioning trusts funds as utility assets. Section 8-508.1(a)(3) defines a "decommissioning trust" as "a fiduciary account in a bank or other institution established to hold the decommissioning funds provided . . . for the eventual purpose of paying decommissioning costs, which shall be separate from *all other accounts and assets of the public utility establishing the trust.*" 220 ILCS 5/8-508.1(a)(3) (emphasis added). Thus, the General Assembly, which also used the term "assets" in Section 16-111(g), understood and intended the decommissioning trusts to be public utility assets, which are to be kept separate and apart from other utility assets. The fact that they are "separate" from other utility assets does not render the decommissioning trusts something other than utility assets.

IIEC characterizes the Commission's reading of the General Assembly's express characterization of decommissioning trust funds as “assets of the public utility” in Section 8-508.1 as being "out of context." IIEC, however, does not offer any explanation as to what the legislature must have "really" meant in that context. The General Assembly's express characterization of the funds as utility assets is clear and unequivocal, and the Commission properly applied the express terms of the Act.

Further, as the record shows and the Order recognizes, the treatment of the trust funds as utility assets is consistent with both common use of the term "asset" and accepted accounting practices. An “ordinary” definition of "assets" is "the entries on a balance sheet showing all properties and claims against others that may be applied, directly or indirectly, to cover liabilities." *American Heritage Dictionary*, 2d Edition. The nuclear decommissioning trust funds fully satisfy that definition. The trust funds are recorded on ComEd's books, as the accounting entries submitted with the Notice show. ComEd Ex. 1, App. H, p. 5. The assets are reflected there because they are to be applied to cover ComEd's nuclear decommissioning liability. Further, an independent certified accountant has certified that the entries are consistent with generally accepted accounting principles. ComEd Ex. 1, App. I. Accordingly, any conclusion that the nuclear decommissioning trust funds are not ComEd's "assets" would be inconsistent with both the common understanding of the term and GAAP.

IIEC also contends that the Transfer violates the terms of the trust agreements themselves, which state that ComEd cannot transfer its interest in the trusts. IIEC misinterprets the meaning of this provision. The intent in establishing the trusts was to assure that the funds collected and invested for decommissioning purposes would in fact be available when the time comes for decommissioning. As noted above, the General Assembly sought to keep

decommissioning funds "separate" from other utility assets. The use of trusts accomplishes this by restricting ComEd's use of the funds to proper decommissioning uses, and by protecting the funds from creditors of the Company. See IIEC Cross Ex. 1, §§ 2.2, 2.5. Thus, neither the General Assembly nor ComEd intended to make the trust funds someone else's assets; rather the intent was to limit the use of the funds to covering only those liabilities associated with decommissioning.

Moreover, the trust agreements expressly provide that upon termination of the trusts the balance may be disbursed to ComEd, which of course, may transfer the disbursed trust funds in connection with a transfer of the plants to which they relate. Under the express terms of the trust agreements, termination of the trusts occurs upon "the disposition by the Company of any interest in the Plant for which such Trust was named." IIEC Cross Ex. 1, p. 5.

Accordingly, IIEC offers no persuasive explanation as to how or why the Commission's ruling was flawed. Hence, IIEC cannot demonstrate a likelihood of success on the merits.

B. IIEC Has Not Established Irreparable Harm

IIEC contends that it will be harmed in two ways. First, IIEC alleges that it will lose the protection of the Act with respect to refunds of surplus amounts. Second, IIEC asserts that it will be harmed if ComEd qualifies for a rate increase as a result of such refunds.

The Company recognizes and accepts, and the Order expressly found, that the Commission will retain its authority over prospective decommissioning recovery from ratepayers under ComEd's Rider 31. The Contribution Agreement expressly provides:

[ComEd] will also retain the obligation to recover Decommissioning Cost charges in the manner provided in 220 ILCS 5/9-201.5 and 220 ILCS 5/16-114 and any other applicable laws, regulations or tariffs, including Rider 31 -- Decommissioning Expense Adjustment Clause, *to the extent that the Illinois*

Commerce Commission approves such collections and [ComEd] actually collects such charges.

ComEd Ex. 1, App. A, § 6.6 (emphasis added). The Company proposed, and the Order adopted, language that affirms the Commission's continuing jurisdiction over decommissioning charges.

Moreover, there is no risk of increased rates from refunds. As noted, the Commission will have jurisdiction over prospective recoveries. Further, there is no excess now. Section 8-508.1(C)(3)(iii) requires a utility transferring a nuclear plant for which trust funds have been established to refund to ratepayers any excess in the trust funds resulting from a reduction in the public utility's future decommissioning liability as a result of the transfer. As is clearly explained in the Order, the reduction in ComEd's liability in connection with the Transfer will not produce any excess in the trust funds. Every dollar in the trust funds at the time of the Transfer and every dollar that ComEd thereafter collects from ratepayers for decommissioning will be used to satisfy ComEd's obligations.

Accordingly, IIEC will suffer no irreparable harm from the Transfer.

C. The Harm to ComEd Would Be Significant

A stay would have significant economic and financial consequences for ComEd. Moreover, a stay by this Commission -- as opposed to a stay by an Appellate Court, which can impose a bond requirement -- would not provide any means of recovering losses and other damages when ComEd prevails on appeal. IIEC, which will suffer no harm, does not and cannot explain how the harm to ComEd is outweighed by the other factors.

In sum, there is no basis for granting a stay in this proceeding and IIEC's Motion should be denied.

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

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Certificate of Service

Christopher W. Flynn, an attorney, hereby certifies that he caused copies of Commonwealth Edison Company's Response to Motion to Stay Order to be served on the Service List by electronic mail this 1st day of September, 2000.

Christopher W. Flynn